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In the Supreme Court of the United States

OCTOBER TERM, 1978

NORMAN A. CARLSON, DIRECTOR, FEDERAL BUREAU OF PRISONS, ET AL., PETITIONERS

v.

MARIE GREEN, ADMINISTRATRIX OF THE ESTATE OF JOSEPH JONES, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONERS

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 581 F.2d 669. The opinion of the district court (Pet. App. 22a-27a) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 18a-19a) was entered on August 3, 1978. A timely petition for rehearing was denied on November 24, 1978 (Pet. App. 20a-21a). The petition for a writ of certiorari was filed on February 13, 1979, and was granted on June 18, 1979 (A. 29). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Eighth Amendment gives rise to an implied cause of action in circumstances in which the Federal Tort Claims Act provides an adequate federal remedy.

2. Whether, if the Eighth Amendment creates such a right, survival of that action is governed by federal common law rather than the state statutes that apply to analogous cases.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

2. The Eighth Amendment to the United States Constitution provides in relevant part:

> [C]ruel and unusual punishments [shall not be] inflicted.

3. 28 U.S.C. 1331(a) provides in relevant part:

> The district courts shall have original jurisdiction of all civil actions wherein the amount in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States * * *.

4. 28 U.S.C. 1346(b) provides in relevant part:

> [T]he district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

5. The Rules of Decision Act, 28 U.S.C. 1652, provides:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.

6. 28 U.S.C. 2674 provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

7. Ind. Code Ann. § 34-1-1-1 (Burns 1973) provides:

> All causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to such action, by or against the representative of the deceased party, except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein. Any action contemplated in this section or in section 6 of this act may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Every such action shall be deemed to be a continued action, and therefore accrued to such representatives or successors at the time it would have accrued to the deceased if he had survived. If any such action is continued against the legal representatives or successors of the defendant, a notice shall be served on him as in the case of an original notice. If any action has been commenced against the decedent prior to his death, the same shall continue by substituting his personal representatives as in other actions surviving the defendant's death; in event the action be brought subsequent to the death of the party against whom the cause existed, then the same shall be prosecuted as other claims against said decedent's estate. Provided, however, That when a person receives personal injuries caused by the wrongful act or omission of another and thereafter dies from causes other than said personal injuries so received, the personal representative of the person so injured may maintain an action against the wrongdoer to recover damages re-

> sulting from such injuries, if the person so injured might have maintained such action, had he or she lived; but Provided, further, That the personal representative of said injured person shall be permitted to recover only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death.

8. Ind. Code Ann. § 34-1-1-2 (Burns 1973) provides:

> When the death of one is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action therefor against the latter, if the former might have maintained an action had he or she, as the case may be, lived, against the latter for an injury for the same act or omission. When the death of one is caused by the wrongful act or omission of another, the action shall be commenced by the personal representative of the decedent within two [2] years, and the damages shall be in such an amount as may be determined by the court or jury, including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission. That part of the damages which is recovered for reasonable medical, hospital, funeral and burial expense shall inure to the exclusive benefit of the decedent's estate for the payment thereof. The remainder of the damages, if any, shall, subject to the provisions of this act, inure to the exclusive benefit of the widow or widower, as the case may be, and to

the dependent children, if any, or dependent next of kin, to be distributed in the same manner as the personal property of the deceased. If such decedent depart this life leaving no such widow or widower, or dependent children or dependent next of kin, surviving her or him, the damages inure to the exclusive benefit of the person or persons furnishing necessary and reasonable hospitalization or hospital services in connection with the last illness or injury of the decedent, performing necessary and reasonable medical or surgical services in connection with the last illness or injury of the decedent, to the undertaker for the necessary and reasonable funeral and burial expenses, and to the personal representative, as such, for the necessary and reasonable costs and expenses of administering the estate and prosecuting or compromising the action, including a reasonable attorney's fee, and in case of a death under such circumstances, and when such decedent leaves no such widow, widower, or dependent children, or dependent next of kin, surviving him or her, the measure of damages to be recovered shall be the total of the necessary and reasonable value of such hospitalization or hospital service, medical and surgical services, such funeral expenses, and such costs and expenses of administration, including attorney fees.

STATEMENT

Joseph Jones, Jr., died in the federal penitentiary at Terre Haute, Indiana, while serving 10 years' imprisonment for bank robbery. Respondent, as administratrix of her son's estate and next of kin, brought this suit seeking money damages. She al-

leged that her son's death was the result of deliberate indifference to his medical needs in violation of the Fifth and Eighth Amendments to the Constitution.

1. Respondent's complaint alleges the following events.[1] On his entry into the federal prison system in 1972, Jones was diagnosed as a chronic asthmatic. Jones arrived at the Terre Haute prison in July 1974. Between July 30 and August 6, 1975, Jones was hospitalized outside the prison for his asthmatic condition. At that time, the attending physician recommended that Jones be transferred to a prison in a better climate and also ordered certain medication and treatment. Jones remained in Terre Haute and did not receive the medication and treatment that had been prescribed (A. 9-10).

On August 14, 1975, Jones complained of another asthma attack and was admitted to the prison hospital. Jones remained there for eight hours, sporadically attended by petitioner William Walters, an unlicensed nurse in charge of the infirmary. Despite Jones' steadily worsening condition, no doctor examined him because none was on duty and none was called in.[2] After tending to his other duties, Walters attempted to treat Jones with a respirator that Walters had previously been told was not functioning properly. After Jones pulled away from the machine and complained that it was making his

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[1] In the current procedural posture of the case, we accept as true the factual allegations of the complaint.

[2] The complaint alleges that petitioner Dr. Benjamin DeGarcia, the chief medical officer of the prison, had failed to make any provisions for emergency medical service. (A. 10).

breathing worse, Walters gave Jones two injections of Thorazine, a drug contraindicated for treatment of asthma. About thirty minutes after the second injection, Jones suffered a respiratory arrest. Walters and petitioner Emmett Barry attempted to revive Jones by administering an electric jolt to him, but neither Walters nor Barry knew how to operate the emergency apparatus. Jones was then taken to the local hospital, where he was pronounced dead (A. 10-11).

2. On June 18, 1976, respondent filed this suit in the United States District Court for the Southern District of Indiana, claiming that the acts summarized above caused the death of her son and constituted gross and intentional medical maltreatment in violation of the Fifth and Eighth Amendments. The complaint named as defendants Norman A. Carlson, the Director of the Federal Bureau of Prisons; Robert T. Brutshe, the Assistant Surgeon General; various officials at the Terre Haute Penitentiary;[3] and the Joint Commission on the Accreditation of Hospitals.[4] Respondent alleged jurisdiction under 28 U.S.C. 1331 and sought $1,500,000 compensatory and $500,000 punitive damages and attorneys' fees (A. 8-9, 12-13).

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[3] The warden of the Terre Haute Penitentiary was never served with the complaint, and he is not a party to this case (Pet. App. 16a n.12). The other prison officers named in the suit were Dr. DeGarcia, Walters, and Barry.

[4] The Department of Justice does not represent the Joint Commission.

In January 1977 the district court dismissed the action on jurisdictional grounds.[5] The court first concluded that a damages action for constitutional violations is available under the rationale of this Court's decision in *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), and that respondent had alleged sufficiently a violation of her son's Eighth Amendment rights (Pet. App. 25a-26a). See *Estelle* v. *Gamble*, 429 U.S. 97 (1976). The court held, however, that because under Indiana law respondent's recovery was limited to "reasonable hospital, medical and burial expenses, * * * it [was] apparent that [respondent] cannot 'in good faith' satisfy the [$10,000] jurisdictional amount requirement" of 28 U.S.C. 1331 (Pet. App. 27a).[6]

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[5] The court also found that three of the six federal defendants had been improperly served and therefore dismissed the action against them on this alternative ground (Pet. App. 23a-24a).

[6] The Indiana Civil Code provides that "[a]ll causes of action shall survive * * * except actions for personal injuries to the deceased party, which shall survive only to the extent provided herein." Ind. Code Ann. § 34-1-1-1 (Burns 1973). Where the injured person "dies from causes other than said personal injuries so received," then the deceased's representative may recover "only the reasonable medical, hospital and nursing expense and loss of income of said injured person, resulting from such injury, from the date of the injury to the date of his death." *Ibid.* If the injury causes the death of the wronged party the decedent's representative usually may recover unlimited damages. Ind. Code Ann. § 34-1-1-2 (Burns 1973). But where, as here, the decedent leaves no spouse or dependent children or kin, the representative may recover only medical, hospital, burial and administration expenses. *Ibid.* Jones had no wife, children or dependent kin, and his medical, hospital, and funeral expenses were paid by the federal government.

The court of appeals reversed in substantial part.[7] The court agreed with the district judge that respondent had alleged sufficiently a *Bivens*-type right of recovery arising under the Eighth Amendment. The court refused, however, to apply the Indiana survival and wrongful death provisions to this case. The court concluded that "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (Pet. App. 13a). The court recognized that the Indiana rule would not thwart any interest of Jones, but it concluded that application of the state statute would "subvert" the "policy of allowing complete vindication of constitutional rights" by making it "more advantageous for a tortfeasor to kill rather than to injure" (*id.* at 12a).

SUMMARY OF ARGUMENT

I

In *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971), this Court held that a victim of official conduct in violation of the Fourth Amendment had a right to recover damages in federal court despite the absence of any statute creating such a cause of action. The Court did not conclude, however, that

[7] The court of appeals affirmed the dismissal of this action with regard to one of the federal defendants whom respondent had failed to serve at all (Pet. App. 16a n.12). See note 3, *supra*. However, the court reversed the dismissal of two other federal defendants, holding that service upon them by certified mail was proper under Fed. R. Civ. P. 4(e) and (f) and Ind. Code Ann., Trial Rule 4.4 (Pet. App. 15a-16a).

implication of a constitutional damages action was always appropriate. Rather, the Court strongly suggested that recognition of a *Bivens*-type remedy was inappropriate in circumstances in which Congress had taken affirmative action to supply another remedy. See *id.* at 396-397. As Mr. Justice Harlan's concurring opinion succinctly summarized, "[t]he question then, is * * * whether compensatory relief is 'necessary' or 'appropriate' to the vindication of the [constitutional] interest asserted." *Id.* at 407.

The Court's subsequent decisions have confirmed that the rationale in *Bivens* does not apply where Congress itself has created an appropriate remedy. For example, in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), the Court found that Section 717 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, constituted a federal employee's exclusive remedy for employment discrimination and that government personnel therefore could not seek relief in a *Bivens*-type action. And just last Term, in addressing the scope and application of constitutional damages actions, the Court observed: "[O]f course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 19. Accordingly, the lower courts have repeatedly refused to extend *Bivens* where a federal statute provides relief for a particular kind of constitutional violation.

We submit that the comprehensive administrative and judicial procedures provided by the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671

et seq., constitute an adequate federal remedy for the kind of constitutional violation that was alleged to have occurred in this case. The FTCA imposes liability on the United States for many of the torts committed by federal employees acting within the scope of their official duties. In particular, it is well established that the FTCA covers claims of improper medical treatment of prisoners such as those made by respondent. In fact, since most medical malpractice in the prison context does not rise to the level of an Eighth Amendment violation (see *Estelle* v. *Gamble*, 429 U.S. 97, 105-106 (1976)), the FTCA is a more extensive remedy for this type of complaint than a *Bivens*-type suit. Moreover, the FTCA remedy is ordinarily a preferable remedy because the defendant is the government rather than individual employees who are likely to be judgment proof.

Thus, extension of *Bivens* in this case is unwarranted. The FTCA, which represents the considered judgment of Congress in this area, is a complete and sufficient compensatory mechanism. Judicial recognition of another, redundant remedy seemingly violates basic principles of constitutional adjudication and separation of powers. Moreover, implication of a constitutional damages action is especially inappropriate in this case because it would allow a litigant to "avoid * * * all of th[e] detailed and specific provisions of the [FTCA] * * * [and to] bypass the administrative process, which plays such a crucial role in the scheme established by Congress * * *." *Great American Federal Savings & Loan Ass'n* v. *Novotny*, No. 78-753 (June 11, 1979), slip op. 9.

Considerations of public policy also strongly militate against expanding the scope of implied constitutional damages actions to encompass circumstances such as those presented here. As compared to a *Bivens*-type suit, the FTCA is most often a far better remedy for the victims of unlawful governmental conduct in terms of ease of proof and both certainty and speed of relief. Furthermore, suits under the FTCA do not chill vigorous official action. Assessing liability directly against the government (which in most cases ought to bear the financial burden) is more likely to prompt adoption of curative measures thereby deterring future violations, especially for the kind of systemic failure alleged in this case. Concomitantly, because of the FTCA's mandatory administrative claim procedures, remitting would-be plaintiffs to their remedies under the FTCA will keep the overwhelming majority of cases from ever reaching the federal courts. See, *e.g.*, S. Rep. No. 1327, 89th Cong., 2d Sess. 2-4 (1966).

II

If the Court nonetheless concludes that respondent may sue directly under the Eighth Amendment, it must then fashion a rule of survival for *Bivens*-type suits. In accordance with the Rules of Decision Act, 28 U.S.C. 1652, and for reasons of convenience and judicial limitations, the federal courts routinely adopt pertinent state law to fill the procedural gaps often found in federal law. For example, since 1830, this Court has consistently held that, in the absence of contrary congressional directive, state statutes gov-

ern the period of limitations for federal causes of action unless application of that state law would wholly frustrate the federal scheme. This approach is particularly appropriate with regard to survivorship and wrongful death statutes which typically represent a legislative alteration of common law rules and implicate the state interests underlying estate and domestic relations law.

In *Robertson* v. *Wegmann*, 436 U.S. 584 (1978), this Court held that state survival laws ordinarily control civil rights actions brought against state officials under 42 U.S.C. 1983. In concluding that the Louisiana survival law abated the constitutional damages action in that case, the Court observed that "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." 436 U.S. at 593. Nonetheless, *Robertson* is not dispositive of this case because the Court indicated that where the state law was generally hostile to survival of constitutional tort suits or where the official misconduct caused the death of the victim, application of state law might be inappropriate. 436 U.S. at 594. In our view, neither of these considerations warrants judicial legislation of a federal common law of survivorship in this case.

Under Indiana law (and unlike the Louisiana law applied in *Robertson*), all causes of action survive. To be sure, Indiana restricts the kinds of recoverable damages where, as here, the decedent is not survived by a spouse or any dependent relative. (In fact, in the unique circumstances of this case, respondent cannot satisfy the $10,000 jurisdictional amount set forth in 28 U.S.C. 1331.) But, as evidenced by the many similar state and federal statutes, this decision to limit windfall recoveries is not unreasonable. Nor can it fairly be contended that application of Indiana survival law frustrates the policy of deterrence underlying implication of a constitutional damages action. The availability of full compensation in most instances acts as a formidable deterrent factor. See *Carey* v. *Piphus*, 435 U.S. 247, 256-257 (1978). And it is too far-fetched to assume that the institutional breakdown in the prison medical system that is alleged to have occurred here was predicated on the intricacies of Indiana survivorship law. In sum, the court of appeals should have applied the local survival statute as the governing law rather than creating a free-wheeling federal rule of survival in favor of respondent.

ARGUMENT

I

IMPLIED CONSTITUTIONAL CAUSES OF ACTION FOR DAMAGES ARE INAPPROPRIATE IN CIRCUMSTANCES IN WHICH THE FEDERAL TORT CLAIMS ACT CONSTITUTES AN ADEQUATE FEDERAL REMEDY FOR IMPROPER OFFICIAL CONDUCT

A federal official's unconstitutional conduct may give rise to a suit for damages implied directly under the Constitution. See, *e.g.*, *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971). But this Court has never indicated that such a constitutional damages action is always appropriate whenever an agent of the federal government violates a person's constitutional rights. To the contrary, as we discuss below,

Bivens itself was premised on the absence of any other remedy to redress the kind of constitutional wrongs there at issue. The Court's analysis in *Bivens* and subsequent cases demonstrates that where Congress has provided a comprehensive remedy to recompense the victims of unlawful governmental action, extension of *Bivens* is unwarranted. See Dellinger, *Of Rights and Remedies: The Constitution As A Sword*, 85 HARV. L. REV. 1532, 1549-1551 (1972); Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1153 (1969). Because the Federal Tort Claims Act ("FTCA") provides a federal statutory remedy for Eighth Amendment violations such as those alleged by respondent,[8] the court of appeals erroneously recognized a constitutional damages action in this case.[9]

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[8] The Court has never sustained a constitutional claim for damages based on the Eighth Amendment. The government does not contend, however, that violation of the Eighth Amendment can never give rise to an implied cause of action. See *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 13-14. We further note that respondent asserted in her complaint that the actions of the various prison authorities also violated the Fifth Amendment (A. 12).

[9] Although the government contended in the court of appeals that recognition of an implied constitutional damages action was inappropriate in this case, we did not raise below the precise issue briefed in point I. Nevertheless, the Court has discretion to consider this issue on the merits (see, *e.g.*, *Youakim* v. *Miller*, 425 U.S. 231, 234 (1976)), and we submit that the Court should exercise that discretion in the particular circumstances of this case. First, the issue that the government erroneously believed had been raised in the court of appeals was actually submitted to the Fourth Circuit in a case that is being held pending resolution of this case. See *Moffitt* v. *Loe*, No. 78-1260. Moreover, the second issue posed by this case, which is independently worthy of plenary review by this Court, was presented to and considered by the court of appeals. Thus a decision not to address point I in this case would not serve the ends of judicial administration, because the Court in all likelihood would consider the second issue presented here and would also grant the government's petition in *Loe* to consider the issue fully briefed here as point I. Finally, although the issue discussed in point I was squarely raised as the first question presented in the government's petition for a writ of certiorari, respondent's brief in opposition to the government's petition did not object to Court's consideration of this issue on procedural grounds but instead comprehensively addressed the substance of the government's claim.

A. The *Bivens* Line Of Cases Does Not Encompass Circumstances In Which Congress Has Provided An Adequate Remedy

1. In *Bivens*, this Court established that persons whose Fourth Amendment rights have been violated by federal agents may bring an action in federal court to recover damages caused by such unconstitutional conduct. The Court first concluded that the Fourth Amendment constitutes an independent limitation on the exercise of federal power regardless of state law. 403 U.S. at 392-394. The Court then rejected the contention that the victims of unlawful searches and seizures should be remitted to their remedies under state law because "[t]he interests protected by state laws regulating trespass and the invasion of privacy, and those protected by the Fourth Amendment's guarantee against unreasonable searches and seizures, may be inconsistent or even hostile." *Id.* at 394. Finally, the Court noted (*id.* at 395) that "[h]istorically, damages have been regarded as

the ordinary remedy for an invasion of personal interests in liberty," and that there was no occasion to depart from that rule since "[t]he present case involved no special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396.[10]

Bivens thus explicitly recognized that judicial recognition of a compensatory remedy for Fourth Amendment violations is not compelled by the Constitution. Rather, implication of a constitutional damages action was appropriate in *Bivens* because state law did not provide an adequate remedy for the class of people in Bivens' circumstances and because Congress had neither indicated its intent to preclude such relief nor provided an alternative means of redressing official wrongs. Where, however, there is "another remedy, equally effective in the view of Congress," the Court strongly suggested that the judiciary ought to refrain from formulating an additional cause of action based directly on the Constitution. 403 U.S. at 397. See Lehmann, *Bivens And Its Progeny: The Scope Of A Constitutional Cause Of Action For Torts Committed By Government Officials*, 4 Hast. Const. L. Q. 531, 578-579 (1977).

This analysis was further explicated in Mr. Justice Harlan's concurring opinion. After noting that the injuries suffered by Bivens were "of the sort that, if proved, would be properly compensable in damages"

[10] The Court had previously held that federal jurisdiction for such an action existed under 28 U.S.C. 1331. See *Bell* v. *Hood*, 327 U.S. 678 (1946). See also *Bivens*, *supra*, 403 U.S. at 396; *id.* at 398 (Harlan, J., concurring).

(403 U.S. at 408),[11] Mr. Justice Harlan stated (*id.* at 409-410; emphasis supplied):

> [I]t is apparent that some form of damages is the only possible remedy for someone in Bivens' alleged position. It will be a rare case indeed in which an individual in Bivens' position will be able to obviate the harm by securing injunctive relief from any court. *However desirable a direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit.* Finally, assuming Bivens' innocence of the crime charged, the "exclusionary rule" is simply irrelevant. For people in Bivens' shoes, it is damages or nothing.[12]

2. On several subsequent occasions, the Court has confirmed that the result in *Bivens* was not constitu-

[11] We do not contend that the alleged injuries suffered by respondent's son are not "properly compensable in damages." We note, however, that Mr. Justice Harlan's focus on the type of injury involved has been adopted by the Court as another factor to be considered in determining whether to imply a constitutional cause of action for damages. See, *e.g.*, *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), slip op. 16; *Carey* v. *Piphus*, 435 U.S. 247, 255-259 (1978).

[12] The Chief Justice, Mr. Justice Black, and Mr. Justice Blackmun filed separate dissenting opinions, indicating that the Court was improperly legislating a cause of action. See 403 U.S. at 411-412, 427-430. The Chief Justice further suggested that Congress should create an effective administrative remedy "as it did for example in 1946 in the Federal Tort Claims Act" as a substitute for the judicially created remedies for Fourth Amendment violations (*i.e.*, the exclusionary rule and presumably *Bivens* itself). *Id.* at 421. Congress did subsequently amend the FTCA to encompass unlawful searches and seizures. See Pub. L. No. 93-253, Section 2, 88 Stat. 50, codified at 28 U.S.C. 2680(h). See discussion at pages 31-34, *infra*.

tionally compelled and that extension of the *Bivens* holding is inappropriate where a plaintiff may redress his constitutional injuries under existing federal statutes. For example, in *Brown* v. *General Services Administration*, 425 U.S. 820 (1976), the plaintiff sued his federal employer and supervisors for alleged race discrimination in violation of various federal statutes as well as the Constitution. *Id.* at 822-824. The Court concluded that the "careful blend of administrative and judicial enforcement powers" contained in Section 717 of Title VII, 42 U.S.C. 2000e-16, was plaintiff's exclusive remedy. 425 U.S. at 833. Although the Court did not separately address plaintiff's constitutional claim, the Court's holding squarely refutes the contention that the victim of unconstitutional conduct has a right to sue the individual officials involved regardless of the existence of alternative federal remedies. In addition, the Court's analysis in *Brown* strongly supports our submission that *Bivens* should not be interpreted to permit circumvention of a "careful and thorough remedial scheme" established by Congress (425 U.S. at 833). See discussion at pages 29-31, *infra*.[13]

[13] Because the primary issue in *Brown* was whether the plaintiff could resort to other federal statutes arguably applicable to his claims, much of the discussion in *Brown* concerns whether Congress specifically intended to make Section 717 an exclusive remedy. In holding that Section 717 extinguished recourse to well-established statutory remedies, the Court properly searched for evidence of clear legislative command. See also 425 U.S. at 839 (Stevens, J., dissenting). On the other hand, the question posed here is whether the courts should recognize an implied constitutional cause of action in the absence of congressional authorization and despite the existence of a federal statutory remedy. In our view, that decision depends at least in part on jurisprudential considerations wholly separate from whether Congress intended the FTCA to be the only remedy for victims of constitutional torts.

That the rationale of *Bivens* does not embrace situations that are covered by adequate federal remedies is further evidenced by the Court's opinions in *Butz* v. *Economou*, 438 U.S. 478 (1978). In that case, the federal officials contended in part that they, unlike their state counterparts, were entitled to absolute immunity concerning their discretionary acts, because Congress had never subjected federal officials to a statutory remedy equivalent to 42 U.S.C. 1983. Although the Court rejected this argument, it observed that "[t]he presence or absence of congressional authorization for suits against federal officials is, of course, relevant to the question whether to infer a right of action for damages for a particular violation of the Constitution." 438 U.S. at 503. Moreover, the four dissenting Justices in *Butz* specifically indicated that where Congress had amended the FTCA to allow direct actions against the government for damages caused by unconstitutional official conduct, it would be inappropriate to permit suits against the individual officers. *Id.* at 524-525.[14]

[14] Mr. Justice Rehnquist's dissenting opinion, which was joined by the Chief Justice, Mr. Justice Stewart, and Mr. Justice Stevens, stated that the 1974 amendment to the FTCA, which was intended to cover unlawful searches and seizures by federal agents, "permits a direct action against the Government, while limiting those risks which might 'dampen the ardor of all but the most resolute, or the most irresponsible,

Just last Term, in *Davis* v. *Passman*, No. 78-5072 (June 5, 1979), the Court again addressed the scope and application of the *Bivens* decision. *Davis* arose out of a congressman's decision to discharge a female aide purportedly because of her gender. The aide, seeking damages for the allegedly discriminatory firing, based her suit directly on the Fifth Amendment. The Court concluded that she had alleged a constitutional cause of action and that damages were appropriate because "there are 'no special factors counselling hesitation in the absence of affirmative action by Congress.'" Slip op. 16 (quoting *Bivens*, *supra*, 403 U.S. at 396). The Court specifically stated, however, that "of course, were Congress to create equally effective alternative remedies, the need for damages relief might be obviated." Slip op. 19.

3. To summarize, the Court has thus unequivocally established that recognition of a constitutional damages action like that sustained in *Bivens* is a matter of principled discretion rather than constitutional compulsion. *Davis* v. *Passman*, *supra*, slip op. 1 (Powell, J., dissenting). See, *e.g.*, *Bivens*, *supra*, 403 U.S. at 396-397; *Brown* v. *General Services Administration*, *supra*; *Davis* v. *Passman*, *supra*, slip op. 16, 19.[15] Therefore, whenever Congress has

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in the unflinching discharge of their duties.'" 438 U.S. at 525 (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.)). Implicit in that observation is the thought that the existence of a direct remedy against the government precludes the assessment of liability against the individual officers.

[15] In Professor Monaghan's terminology, *Bivens* is a decision involving the "constitutional common law" and not an interpretation of the Constitution itself, and it is therefore

enacted an adequate remedy for a particular kind of unlawful official conduct, the courts should be chary of endorsing an additional remedy derived from the Constitution in that class of cases.[16] And extension of *Bivens* is especially unwarranted if implication of the constitutional damages action would allow "the com-

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readily subject to case by case application, revision, and modification. See Monaghan, *Foreward: Constitutional Common Law*, 89 Harv. L. Rev. 1, 23-24 (1975). See also Hill, *Constitutional Remedies*, 69 Colum. L. Rev. 1109, 1118 (1969) ("the fact that a constitutional remedy has been judicially prescribed in the absence of legislation does not mean that the legislature lacks power to prescribe an adequate substitute"); Katz, *The Jurisprudence of Remedies: Constitutional Legality And The Law of Torts In Bell* v. *Hood*, 117 U. Pa. L. Rev. 1, 5 (1968) ("Congress can, of course, replace remedies against federal officers by allowing suit against the government").

[16] As Mr. Justice Frankfurter explained in an analogous context, "[w]hen there is such a * * * remedy [against the sovereign] the suit against the officer is barred, not because he enjoys the immunity of the sovereign but because the sovereign can constitutionally change the traditional rules of liability for the tort of the agent by providing a fair substitute." *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 722 (1949) (dissenting opinion).

Accord, *Bush* v. *Lucas*, 598 F.2d 958, 961 (5th Cir. 1979) (no *Bivens* action where Civil Service remedies available); *Turpin* v. *Mailet*, 591 F.2d 426 (2d Cir. 1979) (en banc) (withdrawing prior decision (579 F.2d 152) extending *Bivens* in light of intervening Supreme Court decision establishing alternative statutory remedy); *Molina* v. *Richardson*, 578 F.2d 846, 850-853 (9th Cir. 1978) (*Bivens* rationale not applicable in light of existing remedy under 42 U.S.C. 1983); *Richardson* v. *Wiley*, 569 F.2d 140 (D.C. Cir. 1977) (Title VII preempts *Bivens*-type remedy); *Mahone* v. *Waddle*, 564 F.2d 1018, 1024-1025 (3d Cir. 1977)) (existence of 42 U.S.C. 1981 militates against extension of *Bivens*): *Torres* v. *Taylor*, 456 F. Supp. 951 (S.D. N.Y. 1978) (FTCA remedy precludes *Bivens* suit). Cf. *Brice* v. *Day*, No. 77-2083 (10th Cir. Aug.

plainant [to] completely bypass the administrative process" otherwise mandated by Congress. *Great American Federal Savings & Loan Ass'n* v. *Novotny*, No. 78-753 (June 11, 1979), slip op. 9. See *Brown* v. *General Services Administration*, *supra*, 425 U.S. at 831-833.

It remains only to consider the nature of the remedy provided by the FTCA for a deprivation of a prisoner's Eighth Amendment rights such as that allegedly suffered by respondent's son. We now turn to that question.

B. The Comprehensive Administrative And Judicial Remedies Contained In The FTCA Strongly Militate Against Extension Of *Bivens* In This Case

1. Prior to the passage of the Federal Tort Claims Act in 1946,[17] most persons who were injured as the result of a government employee's tortious conduct had no recourse against the federal government except through the clumsy and adventitious mechanism of introducing private bills in Congress. See S. Rep. No. 1400, 79th Cong., 2d Sess. 7, 29-34 (1946); H.R. Rep. No. 1287, 79th Cong., 1st Sess. (1945).[18] To

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27, 1979). Contra, *Hernandez* v. *Lattimore*, No. 78-2098 (2d Cir. June 7, 1979), slip op. 2896-2898.

See also *Loe* v. *Armistead*, 582 F.2d 1291 (4th Cir. 1978), cert. pending *sub nom. Moffitt* v. *Loe*, No. 78-1260.

[17] The FTCA was originally enacted as Title IV of the Legislative Reorganization Act of 1946, ch. 753, 60 Stat. 842-847.

[18] Since 1920, victims of maritime torts had a statutory remedy against the government. See Act of March 9, 1920, ch. 95, Section 2, 41 Stat. 525, 46 U.S.C. 742.

alleviate this hardship and to eliminate the burden of processing private bills, Congress enacted the FTCA, thus rendering the United States liable in many instances for the torts of its agents.[19] Since the FTCA has its origins in the doctrine of respondeat superior,[20] the employee must, of course, be acting in the scope of his duties. See 28 U.S.C. 2675(a). But if the agent's official conduct would render a private person liable "in accordance with the law of the place where the act or omission occurred" (28 U.S.C. 2672, 2674, 2675), then recovery may be had against the United States except as provided in 28 U.S.C. 2680. However, in no circumstance may punitive damages or prejudgment interest be assessed against the United States. 28 U.S.C. 2674.[21]

The FTCA requires that a claimant first submit his claim to the appropriate agency within two years after such claim accrues. 28 U.S.C. 2401(b), 2675(a).[22] Thereafter, the agency head or his designee is empowered to investigate and to settle any claim fall-

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[19] The FTCA imposes liability on the United States for the wrongful acts of its employees. An award of damages may not be predicated on strict liability. See *Dalehite* v. *United States*, 346 U.S. 15, 44-45 (1953); *Laird* v. *Nelms*, 406 U.S. 797 (1972).

[20] See *Laird* v. *Nelms*, *supra*, 406 U.S. at 801.

[21] In those states where only punitive damages are available for wrongful death, the United States is liable instead for actual or compensatory damages. See 28 U.S.C. 2674.

[22] The issue of when a claim of medical malpractice accrues under the FTCA is currently before the Court in *United States* v. *Kubrick*, cert. granted, No. 78-1014 (Feb. 21, 1979).

ing under the FTCA. 28 U.S.C. 2675.[23] If the agency denies the claim in writing or fails to settle the claim within six months, the claimant may then file suit in the district court. 28 U.S.C. 2675(a), 1346(b). The amount of the suit may not exceed the amount of the claim submitted to the agency (28 U.S.C. 2675(b)), and the suit must be filed within six months of the denial of the administrative claim. 28 U.S.C. 2401 (b); S. Rep. No. 1327, 89th Cong., 2d Sess. 1 (1966). A judgment in a case falling under the FTCA constitutes a bar to suit by the claimant against the individual employee. 28 U.S.C. 2676.[24] The FTCA also ensures that the victims of unlawful official conduct will be the primary beneficiaries of the waiver of sovereign immunity by strictly limiting the amount of attorneys' fees that may be extracted from a settlement or a judgment under the FTCA. See 28 U.S.C. 2678.

[23] If the amount of the settlement exceeds $25,000, the agency must obtain prior written approval from the Attorney General or his designee. As originally enacted, the FTCA permitted administrative settlements for up to $1,000. Any claimant seeking more than that amount had to file suit. Ch. 753, Sections 403(a), 410, 60 Stat. 843-844. Congress soon realized that the $1,000 limit prompted the filing of unnecessary suits, thereby needlessly taxing the resources of the Department of Justice and the courts and delaying the settlement of bona fide claims. In order to relieve the congested court dockets and provide quicker relief to the injured, Congress raised the $1,000 limit to $2,500 in 1959. Pub. L. No. 86-238, 73 Stat. 471; See S. Rep. No. 797, 86th Cong., 1st Sess. 3-4 (1959); H.R. Rep. No. 323, 86th Cong., 1st Sess. 2-3 (1959). In 1966, Congress sought to further "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims * * *." S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966). Accordingly, all claimants are now required to file their claims with the relevant agency in the first instance. The agency, which of course has the best information and is best situated to investigate and dispose of the claim (*id.* at 3), is given six months to settle each claim. Only after exhausting these administrative procedures may the claimant resort to his judicial remedies.

2. It is readily apparent that the FTCA constitutes a comprehensive remedial scheme for the kind of claim raised here. In essence, respondent sued officials of the Federal Bureau of Prisons for the improper and inadequate medical treatment received by her son while he was in prison. The Bureau of Prisons is, of course, an agency covered by the FTCA. See 28 U.S.C. 2671. Moreover, the FTCA has long been construed to encompass prisoners' claims for damages consequent to prison medical malpractice. See, *e.g.*, *United States* v. *Muniz*, 374 U.S. 150, 151-152 (1963); *Brown* v. *United States*, 374 F. Supp. 723 (E.D. Ark. 1974). See also S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966). Indeed, if a complaint alleges medical mistreatment so serious as "to evidence deliberate indifference to serious medical needs" in violation of the Eighth Amendment (see *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976)), the existence of a cause of action under the broader coverage of the FTCA cannot be doubted.[25]

[24] A suit dismissed under the statutory exceptions to the FTCA (28 U.S.C. 2680) is not a suit "under [28 U.S.C.] 1346(b)" within the purview of Section 2676 and thus does not bar an action against the individual employee.

[25] Insofar as respondent's complaint may have asserted that the prison authorities intentionally violated her son's

Claims such as those asserted by respondent thus stand on a completely different footing than those asserted by persons in Bivens' circumstances. Here, Congress has enacted a compensatory mechanism for injuries like those allegedly suffered by respondent. Furthermore, that federal remedy permits direct recovery against the public fisc rather than forcing the victims of unlawful official conduct to face the uncertainties of individual defendants' financial condition.[26] To be sure, the FTCA incorporates state law as a basis for recovery. But unlike the various state laws of trespass and false arrest canvassed in *Bivens* (403 U.S. at 394-395), the states' laws on negligence uniformly allow recovery for medical malpractice.[27]

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rights (A. 13), relief was available under 28 U.S.C. 2680(h), which allows actions against the United States for injuries caused by the intentional torts of "investigative or law enforcement officer[s]." See also S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973). Correctional officers and other employees of the Bureau of Prisons fall within the definition of "investigative or law enforcement officer[s]." See *Torres* v. *Taylor*, *supra*, 456 F. Supp. at 953-954; 18 U.S.C. 3050.

[26] The federal government, unlike some state and local jurisdictions, does not indemnify its employees for personal judgments arising out of their official actions. Compare Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 810-812 (1979).

[27] Here, of course, Indiana law controls. And the Indiana courts have long recognized a cause of action for medical malpractice. See, *e.g.*, *Carpenter* v. *Campbell*, 149 Ind. App. 189, 271 N.E. 2d 163 (1971); *Longfellow* v. *Vernon*, 57 Ind. App. 611, 105 N.E. 178 (1914). Because respondent is not the deceased's spouse, minor child, or dependent relative, Indiana law does limit her recovery to medical, burial, and administrative expenses, see Ind. Code Ann. § 34-1-1-2 (Burns

In short, it cannot be said that state negligence laws are "inconsistent or even hostile" to interests protected by the Eighth Amendment in this regard. See 403 U.S. at 394.

3. As we demonstrated in point IA, *Bivens* and its progeny admonish that when Congress has considered particular kinds of unlawful official conduct and selected specific remedies to compensate victims of that conduct, it is neither necessary nor appropriate to recognize an additional remedy implied directly under the Constitution. See 403 U.S. at 396-397; *id.* at 407 (Harlan, J., concurring); pages 17-24, *supra*. That principle obtains here since the FTCA is a comprehensive administrative and judicial remedy for violations of prisoners' rights such as those presented by respondent's complaint. Indeed, a constitutional cause of action for damages is especially inappropriate in this case, because it would allow litigants to

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1973) and pages 47-48, *infra*. But, as we demonstrate in point II, *infra*, respondent could only recover those items even if she sued under the Constitution. In any event, the *Bivens* decision turned on the relief available to a class of claimants and not the particular success or failure of Webster Bivens' potential suit under New York law. See 403 U.S. at 394-397; *id.* at 407-410 (Harlan, J., concurring). So too here, the appropriate inquiry is whether a constitutional damages action is necessary to vindicate the Eighth Amendment rights of prisoners who receive completely inadequate medical treatment. After all, no Eighth Amendment right of respondent's was violated. Instead, she sues on behalf of her son's estate, and if the FTCA constitutes an adequate remedy for the kind of claim derivatively raised by respondent, then there is no justification for implying an additional constitutional remedy.

avoid the statute of limitations,[28] the administrative procedures,[29] and other provisions [30] carefully imposed

[28] In a *Bivens* action—as in suits under 42 U.S.C. 1983—the courts adopt the pertinent state statute of limitations, which may vary greatly. See pages 43-44, *infra;* Lehmann, *supra,* 4 Hast. Const. L. Q. at 545-549. The FTCA, however, has a specific two-year statute of limitations (the same as that contained in the Indiana wrongful death statute). As originally enacted, the period of limitations was only one year. Ch. 753, Section 420, 60 Stat. 845; S. Rep. No. 1400, *supra,* at 33. Subsequently, Congress weighed the various relevant considerations and increased the period of limitations to two years. See Ch. 92, 63 Stat. 62. The House Report accompanying that Act states (H.R. Rep. No. 276, 81st Cong., 1st Sess. 4 (1949)):

> It is not the intention of the Federal Government to deprive tort claimants of their day in court or of their remedies. Nor, on the other hand, does it propose to encourage delay in the enforcement of a claimant's rights or to harass the Federal agencies in their defense against such suits by increasing the difficulty of their procurement of evidence.

[29] From time to time Congress has considered and expanded the use of the administrative settlement mechanism in order to avoid congestion in the courts, unnecessary involvement of the Department of Justice, and, from the claimant's point of view, the delays in settlement that inevitably accompany the filing of a lawsuit. See pages 25-26 and note 23, *supra;* S. Rep. No. 797, 86th Cong., 1st Sess. 3-4 (1959); H.R. Rep. No. 323, 86th Cong., 1st Sess. 1-3 (1959); S. Rep. No. 1327, 89th Cong., 2d Sess. 2-4 (1966); H.R. Rep. No. 1532, 89th Cong., 2d Sess. 5-8 (1966).

[30] For example, the FTCA expressly limits the amount of attorneys' fees that may be extracted from an FTCA award or settlement. See 28 U.S.C. 2678. Violations of those limitations are punishable by fine or imprisonment. Moreover, Congress specifically chose to preclude awards of punitive damages and jury trials, both of which may be available in a *Bivens* action. See 28 U.S.C. 2674, 2402. See *Novotny, supra,* slip op. 8-9. While it might be argued that the unavailability of a jury trial suggests the inadequacy of the FTCA remedy, empirical data shows that juries are exceedingly biased against prisoners and in favor of government officials in these kinds of suits. See Project, *Suing the Police in Federal Court,* 88 Yale L.J. 781, 789-809 (1979).

by Congress in this area. See *Brown* v. *General Services Administration, supra,* 425 U.S. at 829-833; *Greater American Federal Savings & Loan Ass'n* v. *Novotny, supra,* slip op. 8-9; cf. *Touche Ross & Co.* v. *Redington,* No. 78-309 (June 18, 1979), slip op. 13; *Preiser* v. *Rodriguez,* 411 U.S. 475 (1973).

Nonetheless, it has been suggested that the legislative history of the 1974 amendment to the FTCA [31] refutes the government's submission on this point. See *Hernandez* v. *Lattimore,* No. 78-2098 (2d Cir. June 7, 1979), slip op. 2896-2898; but see *Torres* v. *Taylor, supra.* Following the *Bivens* decision, Congress amended the FTCA to allow direct recovery against the government for some of the intentional torts of federal law enforcement officers. An earlier Senate Report [32] commented that

> this provision should be viewed as a counterpart to the *Bivens* case and its progenty [*sic*], in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in *Bivens* (and for which that case imposes liability upon the individual Government officials involved.)

[31] Pub. L. No. 93-253, Section 2, 88 Stat. 50.

[32] The Senate Report was issued in 1973. The amendment was passed the following session of Congress without reports.

S. Rep. No. 93-588, 93d Cong., 1st Sess. 3 (1973). Although that report superficially supports respondent's contention, we submit that it does not undermine the conclusion that existing remedies militate against extension of *Bivens* in this case.[33]

The Senate Report initially observes that a *Bivens*-type action is "usually * * * a rather hollow remedy" (*ibid.*) and that the relief afforded by the FTCA is ordinarily far better. Thus, at least that portion of the legislative history [34] strongly suggests that application and extension of the *Bivens* rationale is inappropriate here because the FTCA provides comprehensive relief. See *Turpin* v. *Mailet*, *supra*, 579 F.2d at 166 ("Courts should only create a cause of action

[33] We note that except for cases falling under the Federal Drivers Act, the FTCA does not preclude initial resort to state tort remedies against the individual officers. See pages 34-35, *infra*. However, since the FTCA incorporates the same state law, invariably suit against the government will be preferable to suit against possibly judgment proof federal officials. In any event federal officials acting in the scope of their duties have absolute immunity against state tort liability. See *Butz* v. *Economou*, *supra*, 438 U.S. at 495; *Barr* v. *Matteo*, 360 U.S. 564 (1959); *Spalding* v. *Vilas*, 161 U.S. 483 (1896); *Granger* v. *Marek*, 583 F. 2d 781, 784 (6th Cir. 1978); *Evans* v. *Wright*, 582 F. 2d 20 (5th Cir. 1978).

[34] See also H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 4 (1976). Since the original FTCA predated *Bivens* and *Bell* v. *Hood*, *supra*, the legislative history accompanying the original Act does not shed any light on the interaction of the FTCA and constitutional damages actions. Because the critical inquiry is whether implication of a *Bivens*-type action is necessary to vindicate constitutional rights and not whether Congress specifically intended to substitute the FTCA for constitutional damages actions, the historical sequence of remedies is irrelevant.

where none exists or the need for one is demonstrated"). Although the Report then comments that the amendment should be "viewed as a counterpart to *Bivens*," that isolated statement in a single committee report does not purport to suggest whether the *courts* should recognize an implied constitutional damages action in an area addressed by the FTCA. In fact, the quoted language may well reflect Congress' understanding (albeit erroneous) that *Bivens* was a constitutionally required decision. See Dellinger, *supra*, 85 Harv. L. Rev. at 1545-1549; Katz, *supra*, 117 U. Pa. L. Rev. at 41 n.221; Hill, *supra*, 69 Colum. L. Rev. at 1152-1153. On this view, the passage quoted above is merely an effort on the part of the Senate Committee to avoid what it perceived to be a constitutional issue. Accordingly, the report seems too uncertain a basis for implying constitutional damages remedies, especially if the Court concurs in Congress' view that the FTCA is a more effective remedy than *Bivens*-type actions.

In any event, neither the 1974 amendment nor its legislative history touch upon the issue primarily posed by this case. That amendment concerns only intentional torts such as those at issue in *Hernandez* v. *Lattimore*, *supra*, and *Bivens* itself. Respondent, however, claims that prison officials negligently treated her son's medical condition—a type of official misconduct not addressed by S. Rep. No. 93-588. We further note that there may be some substantial differences between intentional torts and prison medical malpractice justifying *Bivens*-type

liability in the former class of cases but not the latter. The FTCA incorporates state law as a basis for liability, and although the Court indicated in *Bivens* that state tort law did not satisfactorily protect the interests underlying the Fourth Amendment (403 U.S. at 394), we have already demonstrated that the coverage of the FTCA in the area of prisoners' medical care greatly exceeds that encompassed by the Eighth Amendment. See pages 27-29, *supra*. Moreover, intentional torts typically involve individual misconduct arguably warranting individual liability whereas lack of proper medical care for prisoners involves a systemic breakdown rendering individual liability less appropriate.[35] Therefore, even if the Court would adhere to *Bivens* in the Fourth Amendment area despite the 1974 amendment, it does not follow that extension of *Bivens* is warranted in this case.

Nor is there any merit to respondent's suggestion (Br. in Opp. 9) that the exclusive remedy rules of the FTCA eviscerate the government's analysis. See 28 U.S.C. 2676, 2679(b)-(e).[36] Those provisions make the FTCA the exclusive remedy of a victim of unlawful governmental conduct in two circumstances: first, if a judgment is rendered in an FTCA suit falling under 28 U.S.C. 1346, and second, if the liability arises out of a vehicular accident. See *United States* v. *Gilman*, 347 U.S. 507, 509 (1954); note 33,

[35] For example, respondent's claim alleges inoperable machinery, improper planning and inadequate training.

[36] Section 2679(b)-(e) constitutes the Federal Drivers Act portion of the FTCA.

supra. Since Congress intended that Sections 2676 and 2679, where applicable, would extinguish recourse to existing state law remedies, see S. Rep. No. 736, 87th Cong., 1st Sess. 3-4 (1961); H.R. Rep. No. 297, 87th Cong., 1st Sess. 4 (1961),[37] an express legislative directive to that effect was required. Here, however, the question is not whether Congress explicitly intended the FTCA to replace existing remedies, but whether the judicial branch of government ought to recognize another, redundant remedy in an area that Congress has considered and addressed in positive legislation. Certainly, Sections 2676 and 2679 do not suggest that Congress wished the courts to imply new federal remedies thereby avoiding FTCA procedures. Cf. *Touche Ross & Co.* v. *Redington*, *supra*, slip op. 13. Indeed, insofar as they reflect a general congressional intent to limit the personal liability of government employees acting in the scope of their duties, Sections 2676 and 2679 seemingly militate against extending *Bivens* where the FTCA applies. See also 42 U.S.C. 233 (rendering FTCA exclusive remedy for medical malpractice by officials of the Public Health Service).

C. Considerations Of The Judicial Function And Public Policy Weigh Heavily Against Expansion Of *Bivens* In This Case

1. *The Judicial Role.* In point IA above, we observed that this Court and the lower federal courts

[37] Both the Federal Drivers Act and the judgment bar provision predated this Court's decision in *Bivens*, and it is therefore impossible to conclude that Congress in enacting Sections 2676 and 2679 sought to preserve *Bivens*-type remedies.

have repeatedly expressed their reluctance to imply a constitutional damages action when Congress has created an adequate and detailed federal remedy, such as the FTCA. See pages 17-24, *supra*. The reasons for this judicial forebearance seem apparent. First, as Mr. Justice Brandeis explained in his seminal exposition on the principles of constitutional adjudication, the Court does not " 'decide questions of a constitutional nature unless absolutely necessary to a decision of the case' " *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (concurring opinion), quoting *Burton* v. *United States*, 196 U.S. 283, 295 (1905). When a victim of unlawful official action may be fully recompensed under an existing statutory scheme, there is no necessity justifying implication of a redundant remedy based on the Constitution. See *Bivens*, *supra*, 403 U.S. at 407 (Harlan, J., concurring); Dellinger, *supra*, 85 Harv. L. Rev. at 1549-1551. Indeed, judicial activism in that circumtance squarely conflicts with the traditional proscription of unnecessary constitutional adjudication.

More important, recognition of a constitutional cause of action despite the existence of a detailed compensatory scheme trenches upon separation of powers principles. Congress, of course, is better equipped to investigate societal problems, to evaluate public concerns, and to legislate relief than are the courts. See, *e.g.*, *Bivens*, *supra*, 403 U.S. at 411-412 (Burger, C.J., dissenting); Monaghan, *supra*, 89 Harv. L. Rev. at 28-29; Dellinger, *supra*, 85 Harv. L. Rev. at 1556. See also *United States* v. *Standard Oil Co.*, 332 U.S. 301, 314-316 (1947). If Congress

has failed to act, then the courts are warranted in granting appropriate relief to persons who have been injured by a federal agent's unconstitutional acts. *Bivens*, *supra*, 403 U.S. at 396-397; *Davis* v. *Passman*, *supra*, slip op. 18-19. But if a federal statute like the FTCA provides full relief for victims of unlawful official conduct, the courts are not justified in legislating an alternative remedy under the Constitution. And, as we have previously indicated (pages 29-31, *supra*), judicial deference is particularly warranted in this case because Congress has legislated a complete administrative and judicial remedy covering unlawful official conduct of the kind asserted here. See *Brown* v. *General Services Administration*, *supra*; *Great American Federal Savings & Loan Ass'n* v. *Novotny*, *supra*. See also *Katzenbach* v. *Morgan*, 384 U.S. 641, 652-656 (1966).

2. *Public Policy.* Underlying the legal analysis in this case are public policy questions of considerable moment.[38] We have contended above that because

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[38] Congress is currently considering further legislation in this area. See H.R. 2659, 96th Cong., 1st Sess. (1979). If enacted, this bill would substitute direct government liability for all individual liability in cases arising out of the performance of official duties. No proof of actual damages would be required for constitutional torts, minimum recovery would be $1,000, and in some cases maximum recovery would be $15,000. In addition, the government would waive most of the defenses now available to it or to the individual employees. The proposed legislation also provides for administrative sanctions. See *Federal Tort Claims Act Amendments: Hearings Before the Subcomm. on Administrative Law and Governmental Relations of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (statement of then Dep. Attorney General Civiletti); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 1 (1979).

Congress has considered the problem of unlawful official conduct at least in the kinds of circumstances presented by this case and has formulated a comprehensive remedy for that problem, the courts should defer to Congress' judgment on the matter. But insofar as it is appropriate for the Court to weigh anew these legislative considerations, we submit that remitting the victims of governmental misconduct to their remedy under the FTCA serves several important functions.

From the claimants' perspective, a suit against the government is ordinarily preferable. At the outset, we note that proof under the FTCA will often be far less demanding than that required by the Constitution.[39] Because of jury sympathy for the individual officials and against plaintiffs with criminal records, obtaining a judgment against a federal official is, in any event, extremely difficult. See Project, *Suing the Police in Federal Court*, 88 Yale L.J. 781, 788-809 (1979); Bell, *Proposed Amendments to the Federal Tort Claims Act*, 16 Harv. J. on Leg. 2-3 (1979). Indeed, so far as we are aware, only seven judgments against federal employees have ever been awarded in the several thousand *Bivens*-type cases that have been brought.[40] Under the FTCA, however, the government and not an individual employee is the defendant, and, of course, the case is tried without a jury. Further-

[39] For example, medical malpractice in a prison usually will not rise to the level of an Eighth Amendment violation. See *Estelle* v. *Gamble*, *supra*, 429 U.S. at 105-106.

[40] Bell, *supra*, 16 Harv. J. on Leg. at 2 n.5.

more, as the en banc Second Circuit pointed out in *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165, the government "is ordinarily not judgment-proof, and may provide the only source of recovery for an individual injured by a violation of his constitutional rights." And the speedy administrative procedures contained in the FTCA ensure that a meritorious claimant against the government will be compensated far more quickly than one who must seek judicial relief from individual officials, who are generally reluctant to settle. See, *e.g.*, S. Rep. No. 1327, *supra*, at 2.

In addition, substituting the government's liability for that of the individual benefits both the public at large and the operation of government. The fear of personal liability and the burden of trial "dampen[s] the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Learned Hand, J.).[41] See H.R. Rep. No. 297, 87th Cong., 1st Sess. 3, 7 (1961); Dellinger, *supra*, 85 Harv. L. Rev. at 1555; Bell, *supra*, 16 Harv. J. on Leg. at 6 ("Despite the small odds an employee will actually be held liable in a civil suit, morale within the federal service has suffered as employees have been dragged through drawn-out lawsuits, many of which are frivolous").[42] On the other hand, there

[41] The small possibility of state tort suits against individual officials does not weaken this point. Federal officials are protected by absolute immunity against such state tort law liability but have only a qualified immunity regarding constitutional torts. See *Butz* v. *Economou*, *supra*, 438 U.S. at 495; note 33, *supra*.

[42] Attorney General Bell further notes the difficulties that have beset the Department of Justice in defending suits

is substantial indication that imposing liability on the government alone not only encourages more vigorous official action but also actually leads to greater deterrence of constitutional violations by forcing the promulgation of corrective policies. See *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165; Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 Harv. L. Rev. 922, 927 (1976). Moreover, since invariably FTCA claims involve injuries caused in the course of pursuing public objectives, the cost of compensating the victims "is more justly borne by the entire body politic than by agents of the Government." *Birnbaum* v. *United States*, 588 F.2d 319, 333 (2d Cir. 1978); see *Turpin* v. *Mailet*, *supra*, 579 F.2d at 165. Finally, we note that requiring claimants to pursue relief under the FTCA keeps numerous cases out of the courts.

In sum, to paraphrase Mr. Justice Harlan, a direct remedy against the Government is a desirable substitute for individual official liability. *Bivens*, *supra*, 403 U.S. at 410. In *Bivens* itself, of course, the sovereign had not waived its immunity and so only the implication of a constitutional damages action provided adequate relief for people in Bivens' shoes. Here, on the other hand, Congress has squarely addressed the issue of injuries caused by unlawful official conduct and has created a comprehensive remedy for injuries such as those purportedly suffered by respondent's son. Accordingly, "the need for damages

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against individuals. Often conflicts of interest have arisen requiring the government to hire outside counsel at great expense. *Id.* at 7-9.

relief [under the Constitution has been] obviated." *Davis* v. *Passman*, *supra*, slip op. 19.

II

INDIANA LAW GOVERNS THE SURVIVAL OF RESPONDENT'S CONSTITUTIONAL DAMAGES ACTION

If the Court rejects our primary submission, it must then fashion a rule regarding the survival of implied constitutional causes of action. The court of appeals concluded that although ordinarily state law supplies the applicable law of survivorship, "whenever the relevant state survival statute would abate a *Bivens*-type action brought against defendants whose conduct results in death, the federal common law allows survival of the action" (Pet. App. 13a). We cannot acquiesce in such an unprecedented free-wheeling rule. In our view, a court is justified in creating federal common law in this area only in the extraordinary circumstance that application of the state survival statute would wholly frustrate the constitutional interests involved in a *Bivens*-type suit. Because Indiana survival law does not thwart the vindication of constitutional rights in this or other similar cases, we submit that the court of appeals should have applied local law to respondent's claim. Had the court of appeals done so, it would have affirmed the district court's dismissal of respondent's suit for failure to satisfy the $10,000 jurisdictional amount requirement set forth in 28 U.S.C. 1331. See note 46, *infra*.

A. In The Absence Of Contrary Congressional Indication, Federal Law Incorporates State Law With Regard To The Survival Of Federal Question Litigation

It is beyond dispute that the issue of what law governs the survival of constitutional damages actions is a question of federal law. See, *e.g.*, *Burks* v. *Lasker*, No. 77-1724 (May 24, 1979), slip op. 4-5; *Robertson* v. *Wegmann*, 436 U.S. 584, 588 (1978); *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 701 (1966). In other words, there is no contention in this case that state law applies *ex proprio vigore*. But the fact that the origins of respondent's cause of action are in federal (constitutional) law does not make state law irrelevant. See, *e.g.*, *Burks* v. *Lasker*, *supra*, slip op. 5; *United States* v. *Kimbell Foods, Inc.*, No. 77-1359 (Apr. 2, 1979), slip op. 11; *DeSylva* v. *Ballentine*, 351 U.S. 570, 580 (1956). To the contrary, the pertinent precedents of this Court compel the conclusion that where Congress has not specified a particular rule to control quasi-procedural issues such as the period of limitations or survivorship, federal law adopts the relevant state standard unless application of local law would utterly defeat the federal interests involved.

1. Congress often does not supply all of the procedural details of a federal remedial scheme. Indeed, almost by definition, Congress will not have promulgated such rules for causes of action created as a matter of federal common law. In such circumstances, this Court time and again has drafted state law to fill these voids so long as it "furnish[es] convenient solutions in no way inconsistent with adequate protection of the federal interest." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 309 (1947). For example, as early as 1830, the Court concluded that state statutes of limitations supplied the time period within which a federal cause of action must be brought, unless Congress has provided a specific period of limitations. *McCluny* v. *Silliman*, 28 U.S. (3 Pet.) 270, 276-277 (1830). And that rule has been consistently followed. See, *e.g.*, *Campbell* v. *Haverhill*, 155 U.S. 610 (1895); *McClaine* v. *Rankin*, 197 U.S. 154 (1905); *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914) (Civil Rights Act of 1871); *International Union, UAW* v. *Hoosier Cardinal Corp.*, *supra*; *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454, 462 (1975) (Civil Rights Act of 1870).

The Court's analysis in *International Union, UAW* v. *Hoosier Cardinal Corp.*, *supra*, highlights the point sought to be made here. In that case, the Court held that although the policies underlying the national labor laws require a uniform federal common law of collective bargaining agreements,[43] the appropriate state statute of limitations governs a suit brought under Section 301 of the Labor Management Relations Act, 29 U.S.C. 185, to enforce a collective bargaining agreement. The Court observed that quasi-procedural rules like a statute of limitations, which do not have a substantial effect upon day-to-day activity, come into play only when the interests sought to be protected by federal law have been defeated. See 383

[43] See *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448 (1957).

U.S. at 702 & 703 n.4. The Court concluded (*id.* at 702-703):

> Lack of uniformity in this area is therefore unlikely to frustrate in any important way the achievement of any significant goal of labor policy. Thus, although a uniform limitations provision for § 301 suits might well constitute a desirable statutory addition, there is no justification for the drastic sort of judicial legislation that is urged upon us.

Similarly, the law governing survival of constitutional damages actions does not become an issue until after the policy of deterring federal officials from unconstitutional behavior has failed in its purpose. And, except perhaps for the hypothetical case of a federal official who, in depriving a person of his constitutional rights, kills rather than maims because of a peculiar local survival statute, state laws of survivorship simply do not affect or regulate primary daily activity. Accordingly here, as in *International Union, UAW*, "there is no justification for the drastic sort of judicial legislation that is urged" by respondent. 383 U.S. at 703. Indeed, since laws of survivorship involve traditionally local matters such as inheritance laws, domestic relations, and the administration of estates, whereas statutes of limitations do not, the argument for a uniform federal survival rule is even weaker than the case for a uniform period of limitations. See *Wilson* v. *Omaha Indian Tribe*, No. 78-160 (June 20, 1979), slip op. 18; *DeSylva* v. *Ballentine*, *supra*, 351 U.S. at 580; *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 308-309.[44]

Moreover, like statutes of limitations, wrongful death and survival laws are also inherently statutory in nature. At common law, causes of action did not survive the death of the injured person and there was no recovery for wrongful death. See, *e.g.*, *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342, 344-345 (1937); F. Harper and F. James, Jr., 2 *The Law of Torts* § 24.1, at 1284 (1956). In the absence of common law analogues, the courts are less able to fashion such rules. See Hill, *State Procedural Law in Federal Nondiversity Litigation*, 69 Harv. L. Rev. 66, 94 (1955). Thus, as a matter of both convenience and jurisprudential limitations, adoption of state survival rules would ordinarily seem to be the desirable approach to these problems. That conclusion is strongly supported, if not compelled, by the Rules of Decision Act, 28 U.S.C. 1652, which directs the federal courts to apply state law in civil cases "except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide." See *Hill*, *supra*, 69 Harv. L. Rev. at 76-90.

2. The Court's recent decision in *Robertson* v. *Wegmann*, *supra*, settles the proposition that state survival laws generally govern constitutional damages actions against federal officials. *Robertson* involved a suit for equitable and compensatory relief brought

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[44] If, for example, the question arose as to which of several women was the decedent's surviving spouse, undoubtedly federal law would incorporate state law to resolve who could sue to vindicate the deceased's interests. Cf. 42 U.S.C. 416(h) (Social Security Act expressly adopts state domestic relations law).

against a district attorney in New Orleans and others under 42 U.S.C. 1983. The complaint alleged that the defendants had conspired to deprive the plaintiff of his civil rights by repeatedly harassing him and prosecuting him in bad faith. After the district court had granted the plaintiff's request for an injunction but before trial on the issue of liability for damages, the plaintiff died. Thereafter, both the district court and the court of appeals concluded that federal common law permitted the action to go forward even though the Louisiana law of survivorship would have abated the action. 436 U.S. at 586-588. This Court reversed, holding that ordinarily state survival laws control damages suits against state officials pursuant to Section 1983. *Id.* at 590-595.

We are unable to perceive any distinction between state officials and their federal counterparts that renders state laws of survivorship any less applicable to the latter. Cf. *Butz* v. *Economou, supra,* 438 U.S. at 498-499 & n.25. Respondent contends (Br. in Opp. 12, 14) that *Robertson* is inapplicable because the Court's analysis in *Robertson* relies in part on 42 U.S.C. 1988. Section 1988, which instructs the federal courts to turn to state law to supplement "deficiencies" in the Civil Rights Acts so long as that body of law is "not inconsistent with the Constitution and laws of the United States," *Robertson, supra,* 436 U.S. at 588; 42 U.S.C. 1988, does not pertain directly to this case. But, as the court of appeals recognized (Pet. App. 8a-9a), it is certainly not unreasonable for the courts to be guided by that statute and the decisional gloss given the Civil Rights Act

generally in fleshing out the contours of implied constitutional damages actions. See also *Butz* v. *Economou, supra,* 438 U.S. at 498-499. Moreover, both the FTCA, insofar as it represents Congress' considered judgment that state law may be invoked to redress injuries caused by federal officials, and the Rules of Decision Act, which like Section 1988 directs the courts to fill voids in federal law with compatible state provisions (see page 45, *supra*), strongly suggest the soundness of this approach.

Robertson, nonetheless, is not dispositive of this case. The Court specifically reserved several questions in *Robertson.* First, the Court noted that a different result might obtain if the pertinent state survival law was generally inhospitable to constitutional tort claims. Second, the Court intimated no view "about whether abatement based on state law could be allowed in a situation in which deprivation of federal rights caused death." 436 U.S. at 594. As we demonstrate below, neither of these points justifies creation of a federal common law of survivorship in the circumstances of this case.

B. There Is No Justification For Creating A Federal Common Law Of Survivorship Rather Than Applying State Survival Law In This Case

Under Indiana law,[45] all tort claims survive to some extent. See note 6, *supra.* If the tort involves per-

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[45] We do not understand respondent to claim that any other state's survival law applies here. Indiana is the forum state, the place where the alleged cause of action arose, and the residence of many of the defendants as well as respondent's son. See Hill, *supra,* 69 Harv. L. Rev. at 88-90, 91-92, 100.

sonal injuries but does not cause the death of the injured party, the legal representative may recover loss of income and medical, hospital and nursing expenses resulting from the injury. Ind. Code Ann. § 34-1-1-1 (Burns 1973). If the tort causes death, the court or jury may usually award decedent's representative all normal damages "including, but not limited to, reasonable medical, hospital, funeral and burial expenses, and lost earnings of such deceased person resulting from said wrongful act or omission." Ind. Code Ann. § 34-1-1-2 (Burns 1973). However, where, as here, the decedent leaves no spouse or dependent children or kin, the Indiana statute limits, but does not abate, the kinds of damages that may be recovered. In that circumstance, the decedent's estate can only obtain compensation for hospital, medical, funeral, and administration expenses.[46]

The Indiana survival and wrongful death laws thus compare favorably to the Louisiana provisions adhered to in *Robertson*. Where the Louisiana code abated some actions completely, the Indiana statutes permit survival of all actions. And in most circumstances, including most wrongful deaths, Indiana law would afford substantial recovery for personal injuries caused by the unconstitutional conduct of a-

[46] Here, of course, respondent had no hospital, medical or funeral expenses and both courts below found that his administration expenses would not approach the $10,000 jurisdictional requirement of 28 U.S.C. 1331 (Pet. App. 5a n.4, 26a). The 1976 amendment to Section 1331 does not affect the jurisdictional amount for damages actions against federal officials. See, *e.g.*, H.R. Rep. No. 94-1656, 94th Cong., 2d Sess. 2-11 (1976).

federal employee. Without question, Indiana reduces the windfall relief available to non-dependent, non-spousal relatives. But that decision is hardly unreasonable. Cf. *Bangor Punta Operations, Inc.* v. *Bangor & Aroostock R.R.*, 417 U.S. 703 (1974) (windfall recoveries are disfavored). The survival and wrongful death statutes of many states limit either the kinds of damages available or the possible class of beneficiaries or both.[47] Moreover, at least two federal statutes provide that only spouses, children, and *dependent* kin may receive certain circumscribed death benefits. See 5 U.S.C. 8133(a); 33 U.S.C. 909. Furthermore, if a conspiracy to deprive a person of his civil rights in violation of 42 U.S.C. 1985 causes death, the maximum wrongful death liability under any circumstance is $5,000. See 42 U.S.C. 1986.

In light of the generally liberal recovery provisions of Indiana law and its similarity to many state and federal statutes, it is apparent that the Indiana statutes do not frustrate the purposes of compensation and deterrence underlying the creation of constitutional damages actions. See *Robertson, supra*, 436 U.S. at 590-591; *Carey* v. *Piphus*, 435 U.S. 247, 254-257 (1978). Indiana ensures that spouses and dependents are fully compensated, and here, as in *Robertson*, "[t]he goal of compensating those injured by a deprivation of rights provides no basis for re-

[47] See, *e.g.*, F. Harper and F. James, Jr., *supra*, at 1285-1289, 1328-1337; Cal. Prob. Code § 573 (West. Cum. Supp. 1979); Cal. Civ. Pro. Code § 377 (West 1973); Tex. Civ. Code Ann. tit. 77, art. 4675 (Vernon 1952); N.Y. Est., Powers & Trusts Law §§ 5-4.3, 5-4.4, 11-3.2 (McKinney 1967); Ill. Ann. Stat. ch. 70, § 2 (Smith-Hurd 1959).

quiring [greater] compensation of one who is merely suing as the [administratrix] of the deceased's estate." 436 U.S. at 592. Nor can it be fairly contended that application of the Indiana rules will not deter unlawful conduct, especially of the sort complained of here. Many, if not most, prisoners will be survived by either a spouse or a dependent (*id.* at 591-592), and it is simply inconceivable that the breakdown of the entire Terre Haute prison medical system asserted by respondent was predicated on her son's peculiar status. See 436 U.S. at 592-593 & n.10.[48]

Accordingly, we do not believe that the fact that the alleged constitutional tort caused the death of respondent's son justifies judicial legislation of a blanket federal rule of survivorship favoring plaintiffs. Where a federal official purposefully injures or kills a person in violation of the Constitution relying on the provisions of local law, application of that state statute might be said to frustrate the vindication of important federal interests. But here, respondent merely claimed that various prison officials and medical personnel were extremely incompetent and unconcerned in the treatment of her son. To suggest that the untrained attending nurse twice injected Jones with the wrong drug because of his awareness of the intricacies of Indiana survivorship

[48] In *Carey* v. *Piphus, supra,* the Court concluded that the basic purpose of constitutional damages actions under 42 U.S.C. 1983 was compensation (435 U.S. at 254-255) and that deterrence is "inherent in the award of compensatory damages." *Id.* at 256-257. Since application of Indiana law fully compensates the victims of constitutional torts it also deters officials from abusing their public trusts.

law strains credulity. In sum, the court of appeals erred in creating a federal common law of survivorship. See *Whitehurst* v. *Wright,* 592 F.2d 834, 840-841 (5th Cir. 1979); *Beard* v. *Robinson,* 563 F.2d 331, 332-334 (7th Cir. 1977), cert. denied, 438 U.S. 907 (1978); *Hall* v. *Wooten,* 506 F.2d 564 (6th Cir. 1974); *Mattis* v. *Schnarr,* 502 F.2d 588, 590-591 (8th Cir. 1974); *Brazier* v. *Cherry,* 293 F.2d 401, 405-409 (5th Cir.), cert. denied, 368 U.S. 921 (1961); *Perkins* v. *Salafia,* 338 F. Supp. 1325, 1326-1327 (D. Conn. 1972).[49]

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[49] The court of appeals suggested (Pet. App. 10a-13a) that at least some of these cases were distinguishable because the state law involved permitted survival of the action. (Of course, here too, Indiana allows respondent to recover circumscribed damages in state court). But "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation." *Robertson, supra,* 436 U.S. at 593.

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